order that lands now under irrigation may not suffer except in years of actual drought. How large a margin should be allowed for this purpose, is necessarily a matter of discretion. "It is a factor that must vary from locality to locality and from system to system. It is necessarily higher in extremely arid localities and in localities where the normal fluctuations in rainfall are high . . . ." [12] Obviously it should be left primarily to the judgment of the distributing company. But in case of dispute, the Railroad Commission as an administraitve board should have the final decision.[13] This the court recognized in its decision. It reviewed the evidence merely to show that there was enough of it to support the finding.

P. S. M.

PUBLIC SERVICE CORPORATIONS: WHAT ARE PUBLIC UTILITIES?—DEDICATION TO PUBLIC USE.—During the past six months the Supreme Court of California has more clearly defined the enterprises which the state may regulate as public utilities. In a previous number of the CALIFORNIA LAW REVIEW[1] it was contended that "agencies become public utilities independent of a desire of the owners of such agencies and irrespective of any voluntary devotion to public use." [2] The note writer thought that it should be solely a matter of legislative determination, and called in question the California rule requiring a "dedication" of the properties of the agency to public use before it can be considered a public utility. What this doctrine involves, will more clearly appear from a brief discussion of the underlying bases of the modern regulation of public service corporations.

Fundamentally the modern concept of public utilities is drawn from that of the "common callings" in the early common law, which embraced all forms of business. Persons who gave the benefit of their services to their own family or to a few selected persons under special contract were not regarded as engaged in business, but in "private callings."[3] To make an enterprise a "common calling," therefore, it was merely necessary to find a holding out to serve all who might desire the particular service—making a "public profession," as it has been called.[4]

With the coming of the laissez faire economic period, the concept of the common calling was lost from sight, except in the cases of the common carrier and the common innkeeper.[5] But the develop-

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[12] 61 Cal. Dec. 316, 323.

[13] See Wyman on Public Service Corporations, § 1409. Palermo Land & Water Co. v. R. R. Com. (1916) 173 Cal. 380, 160 Pac. 228.

[1] 7 California Law Review, 127.

[2] Supra, n. 1, p. 129, quoting "Control of Public Utilities in California," by John M. Eshelman, 2 California Law Review, 104.

[3] Edward A. Adler, Business Jurisprudence, 28 Harvard Law Review, 135, 149, et seq.

[4] Supra, n. 3, p. 152. See also Wyman on Public Service Corporations, § 200, and 16 West Virginia Law Quarterly, 140, 145.

[5] Supra, n. 3, p. 156, et seq.

ments of the present industrial era made it necessary to extend this regulation to other undertakings. It was natural for the courts to take from the law of common carriers and common innkeepers the principles on which to base this extension. They overlooked the fact, however, that at common law all forms of business came within this category. The monopoly enjoyed by the common carrier and the common innkeeper and the economic necessity of their services to the community were thought to be the bases of the extraordinary duties placed upon them. Consequently, in seeking to bring other enterprises within this class, the courts required the concurrence of these two factors.[6] Whether a given business comes within this definition and should be subject to regulation is obviously a question of fact and policy, and has been recognized as primarily a legislative question.[7] The note writer to whom we have referred would make the judgment of the legislature in this respect absolute. He overlooks, however, the really fundamental essential of a "public profession." This is as necessary today as it was in the day of the "common callings." [8] Furthermore, the Constitution of California seems to make it an express requirement.[9]

The Supreme Court of California is insisting upon this essential when it requires the "dedication to public use of the properties of a business, before it can become the subject of regulation." [10] It

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[6] Wyman on Public Service Corporations, Chapters II, III and IV; 16 West Virginia Law Quarterly, 140.

[7] Ladd v. Southern Cotton Press Co. (1880) 53 Tex 172; Brass v. North Dakota (1894), 153 U. S. 391, 403, 38 L. Ed. 757, 14 Sup. Ct. Rep. 857; Wyman on Public Service Corporations, § 99.

[8] Wyman on Public Service Corporations, Chapters VI and VII. It was the contention of the note writer in 7 California Law Review, 127, that the decisions of the United States courts do not require this element of holding out to serve all who may demand service. This cannot be sustained in the face of the well known passage in Munn v. Illinois (1876), 94 U. S. 113, 24 L. Ed. 77: "When, therefore, one *devotes his property to a use in which the public has an interest,* he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good. . . ." [Italics ours.] This requirement is clearly set forth in Terminal Taxicab Co. v. Kutz (1916) 241 U. S. 252, 255, 60 L. Ed. 984, 36 Sup. Ct. Rep. 583. As to whom service must be held out see Bruce Wyman, The Inherent Limitation of the Public Service Duty to Particular Classes, 23 Harvard Law Review, 339. See also 26 West Virginia Law Quarterly 140, 145 et seq.

[9] Const. of Cal., 1879, as amended 1914, Art. XII, § 23. Certain businesses are defined as public utilities when furnishing services "to or for the public." Then follows the clause declaring that "every" class of private corporations, individuals or association of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulaton." A reasonable interpretation would carry the limitation expressed as to the businesses specifically named into the classes subsequently named by the legislature—i. e., furnishing services "to or for the public." See Producers Transportation Co. v. Railroad Commission (1917) 176 Cal. 499, 503, 504, 169 Pac. 59.

[10] Associated Pipe Line Co. v. Railroad Commission (1917) 176 Cal. 518, 169 Pac. 62, L. R. A. 1918C 849, P. U. R. 1918B 633. The company was carrying largely its own oil and that of a few others under special contract. See 6 California Law Review, 146.

allows the legislature to determine whether "a business by circumstances and its nature" has risen "from private to be of public concern" (that is, has a monopoly of a commodity or service vitally necessary to the community), but forbids the regulation when there has been no "public profession"—or a "dedication" to public use. In *Traber v. Railroad Commission,*[11] a water company having tendered service to all who desire it, a "public profession" was found, and the company was adjudged a public utility. On the other hand, in *Mound Water Company v. Southern California Edison Company,*[12] no holding out was found, because the water company was "organized for the purpose of selling water to certain designated persons selected by it at the time of its organization, or to its stockholders alone for use upon their land, and to no other person. . . ." Accordingly it was held not to be a public utility.

The contention that the determination of what enterprises are public utilities is purely a matter within the police power[13] and should be left to the legislature as such, overlooks the fact that the police power is subject to limitations. When the legislature places the extraordinary duties of public service upon property designed for purely private use, to that extent it takes the property for public use without just compensation.[14] When, too, it seeks to secure for the use of the community a limited supply of water which the owners have reserved to themselves or have agreed by special contracts to supply only to certain designated persons, it is impairing the obligation of contract.[15] These constitutional limitations apply by reason of the century-old concept of the "private callings."

Practically speaking, business will not be enabled to evade regulation by avoiding a "dedication" of their properties to public use. In the most important cases, where the enterprise has been granted a mandatory charter, public franchises, right of eminent domain, or other public privileges, it must have made a dedication to public use before it can acquire such rights.[16] In other cases, a "public profession" may be implied from the conduct of the business.[17] Rendering service to all who demand it raises this implication.[18]

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[11] (July 9, 1920) 60 Cal. Dec. 56, 191 Pac. 366. See also City of Alameda v. Railroad Commission (August, 1920) 60 Cal. Dec. 22.

[12] (Jan. 4, 1921) 61 Cal. Dec. 43, 194 Pac. 1014.

[13] Supra, n. 1, pp. 131, 132.

[14] Associated Pipe Line Co. v. Railroad Commission, supra, n. 10, p. 530.

[15] Mound Water Co. v. Southern California Edison Co., supra, n. 12. See also Allen v. Railroad Commission, (1917) 179 Cal. 68, 175 Pac. 466, in which writ of certiorari was denied by the United States Supreme Court, (1919) 249 U. S. 601, 63 L. Ed. 797, 39 Sup. Ct. Rep. 259.

[16] Wyman on Public Service Corporations, § 50. See also Producers Transportation Co. v. Railroad Commission, supra, n. 9.

[17] Wyman on Public Service Corporations, Chapter VII.

[18] Pinney & Boyle Co. v. Los Angeles Gas & Electric Corp. (1914) 168 Cal. 12, 141 Pac. 620, Ann. Cas. 1915D 471, L. R. A. 1915C 282 (serving gas to domestic consumers); Pinkerton v. Woodward (1867) 33 Cal. 557, 91 Am. Dec. 657 (keeping a lodging house as inns are generally kept); Fay v. Pacific Improvement Co. (1892) 93 Cal. 253, 20 Pac. 1099, 28 Pac. 943 (advertising a resort hotel for public trade); Camp Rincon Resort Co. v. Eshelman (1916) 172 Cal. 561, 158 Pac. 186 (telephone service open to all

Nor can an agency avoid regulation when it clearly would be a public utility but for special contracts under which it has done all its business in an effort made in bad faith to negative a dedication.[19] The decision of the United States Supreme Court on this point is too unequivocal to be overlooked.[20] Furthermore, it has been intimated that the fact of organizing a business subsequent to the passage of an act defining it as public, would itself imply a dedication.[21] If this intimation be correct, future attempts to negative any presumptions of a public profession will be fruitless, when the business is of such size and consequence as otherwise to be subject to regulation in the public interest.

Embodying the constitutional guarantees against taking of private property for public use without just compensation, and against the impairment of the obligation of contract, the "dedication" doctrine protects truly private concerns, and will not at the same time interfere with effective regulation in the public interest where the calling truly merits it.

P. S. M.

Book Reviews

THE CIVIL CODE OF BRAZIL. Translated by Joseph Wheless, St. Louis, 1920. xxvi pp. 438. Thomas Law Book Company.

This is a volume of the Foreign Code Series, of which the Argentine and Swiss codes have already appeared. The author is a New York attorney especially conversant with the law of Latin America and his compendium on Mexican law is widely known and used. An introduction, pp. ix-xii, gives a brief history of the code for which nearly all the material is derived from Professor Borchard's "Guide to the Law and Legal Literature of Argentina, Brazil and Chile" (1917) and from the introduction of de Lacerda. A copious index, pp. 357-438, is of material assistance to those who might wish to use the book. Further, Mr. Wheless often puts in parenthesis the Portuguese words he is translating—a proceeding which is so necessary that one can only regret that he did not do more of it.

It cannot be said that the book is likely to be of much practical value, except to orient one generally on the Brazilian way of approaching any legal question. That, however, is not an insignificant matter and, for so much, Mr. Wheless' work deserves

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who asked for it); Parks v. Alta California Telegraph Co. (1859) 13 Cal. 423 (public profession implied from conduct of telegraph business.)

[19] Producers Transportation Co. v. Railroad Commission (1919) 251 U. S. 228, 64 L. Ed. 166, 40 Sup. Ct. Rep. 131, "A common carrier cannot by making contracts for future transportation or by mortgaging its property or pledging its income prevent or postpone the exertion by the State of the power to regulate the carrier's rates and practices."

[20] The Pipe Line Cases (1913) 234 U. S. 548, 58 L. Ed. 1459, 34 Sup. Ct. Rep. 956.

[21] Mound Water Co. v. Southern California Edison Co., supra, n. 12, p. 48.